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In The

Supreme Court of the United States

October Term, 1976

No. 76-1510

RAYMOND W. GRABER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. The Solicitor General adopts the argument first urged by the United States Attorney before the Second Circuit that John Sutter's performance as petitioner's counsel was calculated as part of a trial strategy to benefit the petitioner and enhance the image of the petitioner as an unstable person particularly ill-suited to testify before a grand jury. The basic problem with this argument is that it is totally unsupported by any evidence in the record since the trial court refused petitioner's request for a hearing on his charges against his former attorney. The petitioner's grave misgivings about his attorney were made known to

the court at the time of his arrest,[1] which had in fact occurred because of a misrepresentation to the court by counsel. Judge Dooling and the United States Attorney, upon petitioner's arraignment on the indictment, were seriously concerned about the potential conflict of interest and Sutter thereafter wrote a letter to the judge conceding the potential possibility of a real conflict of interest. No one ever gave the petitioner a chance to explore the question of conflict of interest because his motion for a hearing was denied. The trial judge (who failed to reveal to petitioner the existence of Sutter's letter) simply decided on the basis of the post-trial motion papers, and without a hearing, that what counsel had done was a "tactic."

Thus, contrary to the Solicitor's General's statement (Brief in Opposition, 5), the claim was elaborated and pursued by petitioner and his post-trial replacement counsel to the extent permitted by the District Court . That court's refusal to hold a hearing is, in part, the basis for this application.

2. With respect to the Solicitor General's claim that petitioner has failed to suggest a concrete way in which the conflict prevented effective representation, it is submitted that the facts reveal a clear conflict which prevented counsel from representing petitioner vigorously. Counsel represented other public officials, and one highly placed Republican Party official, who, together with the County Republican Chairman and the Nassau County Republican Committee itself, were the principal targets of the grand jury investigation. Petitioner's attorney was provided and fully paid by a defense fund controlled by the Nassau County Republican Committee. On the face of the record his loyalty had at least to have been divided between his

1. Petitioner told Judge Dooling "On the day of my indictment the Republican Party provided counsel." (A46a). "I always have had this reservation of conflict of interests." (A51a). "Some of [my witnesses] wish to testify for me, but they are in great fear . . . they might lose their jobs if they testify for me." (A81a).

employer (who paid his fee and who was the real target of the investigation) and the client, in whose interests he was charged to act, but who was not paying his bill. Moreover, it is patent that petitioner's former counsel's representation of several defendants indicted by the same grand jury for crimes arising out of a conspiracy suggests the strong possibility of a conflict of interest. The interests of these defendants were inconsistent, in that prevailing public opinion, media pressure and political reality required that someone be convicted, and the only real question in the public mind was, at what level was the conspiracy hatched, and how high in the Republican hierarchy did it reach? This political reality made it impossible for a single counsel, compensated by the Republican organization, adequately and fairly to represent defendants at different levels of the alleged conspiracy.

3. Although counsel wrote to the court (Appendix 15a-16a) that he "was making arrangements" for separate counsel to represent petitioner and two other defendants, that was either a deliberate misstatement of fact or became such when counsel continued to represent all four charged defendants.[2]

2. The New York Code of Professional Responsibility (1970) provides, in part:

> "EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.
>
> EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He

(Cont'd)

4. The fact that petitioner was indicted and convicted for perjury rather than conspiracy does not automatically eliminate the possibility of a conflict of interest on the part of trial counsel. The purpose of the grand jury inquiry was to ascertain who had participated in the so-called "1% scheme" whereby civil servants were allegedly required to contribute that percentage of their annual salary to the Republican Party; it was mainly the

(Cont'd)

should resolve all doubts against the propriety of the representation. . . .

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. . . .

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subject to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client."

Counsel wrote to Judge Dooling on April 19th, 1976 that "It is patent that there is a real possibility that there is a conflict of interest" (A15a). The United States Attorney and the court both received the letter but petitioner never knew of its existence. Thus there was not only no full disclosure to petitioner of the potential conflict, but no disclosure at all. This clearly constituted a violation of the four code sections cited above.

purpose and focus of the grand jury inquiry to discover the source of the 1% policy, *i.e.*, who had given the orders to enforce these contributions. The Nassau County Republican Chairman was patently the focus of the inquiry and the government was clearly using perjury indictments as a weapon to compel subordinate public or party officials to inform on him. It was in the interests of the principal target of the investigation that it be made to appear that the subordinate officials solely, upon their own initiative, requested 1% political donations. Any attorney retained by the Republican organization was obliged to elect one of two competing strategies: either attempt to establish the Republican organization's version of the facts, or permit each client to testify as to his particular version of the facts. In this case, counsel was retained and compensated by the Republican Committee and not by individual defendants; he demeaned and degraded petitioner to the court, and petitioner complained about the quality of the representation as provided and the loyalty of his advocate. Thus the record clearly indicates that counsel resolved the conflict in this case in favor of his employer rather than his client and also indicates that counsel's representation was not a trial tactic that served petitioner's interests.

5. If it is assumed that counsel's representation arose out of a calculated strategy, the record is equally consistent with the existence of a scheme involving a well-cordinated effort by those persons who sought to protect themselves and their political party, and quell the public outcry for convictions by offering petitioner as a scapegoat. The successful execution of such a plan would have required that the defense of all those indicted be coordinated so as to ensure that the selected victim be convicted. Counsel would then have been employed by the party to represent all and implement this strategy of saving the party by sacrificing petitioner.

Such a tactic or strategy would have been utterly inconsistent with petitioner's interests. Adoption of the "tactic"

view, therefore, necessitated a hearing to ascertain the purpose and object of such tactic.

6. The report of the physician who examined petitioner under 18 U.S.C. §4244 — if it existed at all — was never placed in the record, and the Solicitor General seems to argue at footnote 6 that it was the petitioner's obligation to see to it that the report was placed in the record. Petitioner had no burden of placing any such report in the record. The record shows that the trial judge had substantial reason to believe that the petitioner was not competent to stand trial. There is nothing in the record to rebut that inference. It was the government's burden to rebut the inference raised by the judge in ordering the report in the first place. The lack of a report in the record cannot constitute proof that petitioner was competent to stand trial and waive a jury. Petitioner would have moved to challenge the contents of the report under Section 4244 but it was never made available to him and is still not spread upon the record.

7. The Solicitor General argues without basis in fact at page 6 that counsel conferred with petitioner for 15 hours to prepare him to testify. This comment of counsel was specifically denied under oath by the petitioner and his son in the post-trial motion (A439a, 457a-458a) and no evidentiary hearing was ever had on petitioner's claims that he met with counsel for a maximum of 45 minutes on a total of three separate occasions during the entire period from arraignment to trial (A423a).

8. Without serious thought or analysis, the Solicitor General adopts the view that whatever happened in this trial was part of a rational trial plan on the part of counsel. It is perhaps comforting to think that that was the case but petitioner has consistently denied it and, in fact, commenced complaining about the divided loyalty of his attorney before his trial ever began or the guilty verdict rendered — and he was never affored a hearing on the claim. The claim is more than colorable where the attorney's compensation is paid by an organization which is

the real target of his investigation and where the attorney's so-called tactic consisted of demeaning his client before the trier of the fact in a perjury prosecution. The demeaning and degrading comments were made out of petitioner's hearing and it is clear that the statements were not intended to be heard by the petitioner but only rather by the United States Attorney and the court. The record on its face indicates disloyalty on the part of the attorney toward his client[3] and there is no evidence whatsoever in the record that the petitioner ever adopted the attorney's so-called "strategy" as his own.[4]

9. Federal appellate judges have been complaining in recent years about the quality of representation in federal trial courts. That legitimate concern is not served by the Second Circuit's holding that, in effect, tolerates the most egregious misconduct, disloyalty and conflict of interest on the part of trial counsel, fully known to the trial court, and within its power to correct. Upon the wall of the author's law office hangs a print by Honoré Daumier, whose caption, translated from the French, reads, "Defense counsel has just paid tribute to the rare talent exhibited by the public prosecutor in his summation; the prosecutor pays merited hom[illegible]e to the admirable eloquence of defense counsel; the president of the court has applauded both orators. In brief, everyone is excessively satisfied — except the accused." This caption, we submit, aptly applies to the proceedings in this case.

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3. Sutter stated that his client was "obviously trying to avoid the due processes of the law" (A21); that he "doubted the believability of those things" urged by his client (A84-85); and that his client's proposed testimony was "not going to be of any significance. I can assure you." (A328). See pp. 20-22, Petition for Certiorari.

4. Petitioner's strategy was to insist that the witnesses "be allowed to freely tell it like it was" (A453a) and that all necessary witnesses and documents be subpoened to prove that he was not guilty of a material misstatement (A461a).

10. The writ should be granted.

Respectfully submitted,

s/ Richard C. Cahn

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